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IN THE

Supreme Court of the United States

DOCKET NO. ~~1146~~ 246

OCTOBER TERM, 1956

EMILY SHOPS, INC.,
Respondent-Plaintiff,

AGAINST

INTER-STATE TRUCK LINE, INC.,
Petitioner-Defendant.

BRIEF FOR THE RESPONDENT

CHARLES T. WEINTRAUB,
Counsel for Respondent,
45 John Street,
New York 38, New York.

WEINTRAUB & FASS,
Of Counsel.
45 John Street,
New York 38, New York.

IN THE

Supreme Court of the United States

DOCKET NO. 1146

OCTOBER TERM, 1956

EMILY SHOPS, INC.,
Respondent-Plaintiff,

AGAINST

INTER-STATE TRUCK LINE, INC.,
Petitioner-Defendant.

BRIEF FOR THE RESPONDENT

Statement

Petitioner, an interstate common carrier, seeks, by this Writ of Certiorari, to review the judgment of the Supreme Court of the State of New York and the unanimous affirmance of the Appellate Division and Court of Appeals denying its attempt to invoke a limitation of liability for merchandise admittedly lost in transit.

Questions Presented by Petition for Review

The questions presented by petitioner, while couched in provocative language, are clearly not germaine to the issues inherent in the case at bar.

Respondent has consistently maintained, and the New York Courts have recognized, that the host of cases

repeatedly cited by petitioner-defendant, involving variances between published rates and rates actually charged by the carrier, are merely indicative of the purpose and intent of the National Transportation Policy (54 Stat. 889, Act of Sept. 18, 1950, C. 722, Title 1, par. 1) to establish rates and eliminate discrimination. Neither respondent, nor the courts reviewing the instant case, have disputed the principle that, in conformance with this policy, rates would be readjusted in accordance with the published tariff, upon application to the Commission or recourse to the courts. This case patently does not involve nor sanction the enforcement of discriminatory practices or the validation of illegal rates.

The basic issue in the case at bar, so clearly enunciated by the memorandum *per curiam* of the Court of Appeals, is whether a claim of limitation of liability would be enforced without an affirmative valuation by the shipper, especially where the freight charges, in addition thereto, do not consitute a rate at all but a fixed arbitrary sum.

None of the many cited cases offered by petitioner refute the doctrine so clearly enunicated in *Loeb* v. *Friedman's Express*, in which this Court denied certiorari, 331 U. S. 851 to review the judgment of the N. Y. Court of Appeals, 296 N. Y. 1029, affirming the lower courts, 187 Misc. 94, aff'd 271 A. D. 873, that no limitation of liability would be enforced unless the parties thereto, shipper as well as carrier, demonstrate, by affirmative action in writing, their intent to so do. This ruling merely enforces the provisions of the permissive section of the Carmack Amendment (Title 49 U. S. C. A. 20 (11)) and does no violate the letter, spirit or purpose of the National Transportation Policy, *supra*.

May we respectfully observe that petitioner is arguing with proverbial tongue in cheek, that the fact that the

decision of the Court of Appeals in the instant case was printed on the front page of the New York Law Journal, constitutes it as "a matter of more than individual concern." Factually, the vast majority of opinions of the Court of Appeals, a good portion of those of the Appellate Division, and numerous cases in the inferior courts, grace the front pages of the New York Law Journal. May we be permitted the observation that the shipping and transportation fraternity, in the light of the doctrine in *Loeb* v. *Friedman's Express, supra*, can reasonably expect its application in the case at bar. Uncertainty can only arise in the granting of this Writ.

Respondent's Reasons for Denial of the Writ

(1)

The state courts of New York have decided this case in conformance with the enunciated doctrine of this Court and in accordance with the provisions and intent of the Interstate Commerce Act.

The decision of the New York Court of Appeals, as clearly set forth in its memorandum *per curiam*, is the application of the doctrine of *Loeb* v. *Friedman's Express*, to the strikingly similar facts and issue in the instant case. The fact that the *Loeb* case was not only reviewed by the same Court of Appeals but that a Writ of Certiorari was denied by this Supreme Court of the United States, establishes this judicial precedent as one of ultimate authority.

In both the *Loeb* case and in the instant litigation under review, the Uniform Straight Bill of Lading, constituted the basic contract of carriage and contained the identical reference to valuation and limitation of liability.

"NOTE—*Where the rate is dependent on value*, shippers are required to state specifically in writing the agreed or declared value of the property.

The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding ..... per ....."

The carrier, in this case, added the unilateral declaration "when value is not declared, carrier will not assume any liability in excess of 50¢ per pound or $50.00 minimum." In both actions, no affirmative declaration of value was filed in by the shipper and in both instances no rate was agreed upon dependent upon value. The only charge made and agreed upon in the instant case was a flat arbitrary freight charge and no rate was fixed nor valuation contemplated between the parties.

The Court of Appeals, in the case at bar, recognized its similarity with the facts and principles inherent in the *Loeb* case and based its unanimous judgment of affirmance directly upon this ultimate authority (App. A 5).

> "Omission to mention any value of the goods in this bill of lading is non-declaration of value. The situation is that which is described in the bill of lading as occurring 'when value is not declared.' No value having been declared, the bill of lading does not constitute an agreement that the goods were worth any particular amount. Consequently any limitation upon liability of the shipper would have to be based upon a theory of estoppel. Any estoppel would need to be based upon conduct by the shipper misleading to the carrier. * * *
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> * * * * * *
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> It is assumed here, as in the *Loeb* case, that the bill of lading is conformed by law to the provisions

of the filed tariffs. Loeb had not paid any freight charges, yet he was allowed to recover full value. No different result is indicated here, where the shipper paid more than the freight charges corresponding in the filed tariffs to the full value of the goods."

(2)

No court, state or federal, has abrogated the rule that any released value of the property must be declared in writing by the shipper or agreed upon in writing.

Petitioner seems to urge that the doctrine enunciated in the *Loeb* case, as well as in the *per curiam* in the case at bar, constitutes a radical departure from previous judicial interpretation and from the federal statute involved herein.

None of the authorities cited by the petitioner sustain this contention. On the contrary, eloquent and conclusive refutation is found in the express terms of the statute.

Section 20 (11) of the Interstate Commerce Act (49 U. S. C.) imposes a rule of full liability notwithstanding any limitation of liability or agreement as to value with certain carefully defined exceptions. The exception involved herein relates to property which the Interstate Commerce Commission has authorized and required the carrier "to establish and maintain rates dependent upon the value *declared in writing by the shipper or agreed upon in writing as the released value of the property.*"

The requirement is clear, explicit and unequivocal.

In *Caten* v. *Salt Lake City Movers & Storage Co., Inc.*, 149 Fed. 2nd 428, the Court stated:

"* * * To permit a carrier, without any action whatever by the shipper in respect to valuation in

writing, to limit its liability on the basis of declared or released value on which the rate was charged would be to ignore entirely the statutory requirement that the shipper must make the declaration or agreement in writing and nullify that part of the proviso.

"The statute makes it abundantly clear that the carrier's common law liability for full actual damages whether or not caused by its negligence is imposed when it accepts goods for carriage, unless a certain specified agreement limiting that liability has been made as the result of an equally certain specified action by the shipper in respect to a voluntary valuation of his goods. Even then the carrier is not permitted to contract against liability for his own negligence. Only by giving the shipper an opportunity to choose between higher and lower rates based upon valuation can the carrier place the shipper who has selected a lower rate in the prescribed manner in the position where he is estopped to assert loss or damage to an amount in excess of the declared valuation upon which the rate was fixed (*Boston & Maine R. R.* v. *Piper*, 246 U. S. 439; *Hart* v. *Penn. R. R.*, 112 U. S. 331; *Union Pacific R. R.* v. *Burke*, 255 U. S. 317). Here nothing was done by the shippers which amounted to written action by them as to valuation and any agreement limiting the defendant's liability to less than the actual value was void. Therefore it was correct for the District Court to instruct the jury that the defendant was liable for the full value of the plaintiff's goods."

Thus, under the *Orton* decision, the court indicates that even where released rates are authorized by the Commis-

sion and the carrier's tariff makes proper reference thereto, the statute further requires some affirmative, direct and positive act which the court terms "written action." This "written action" constitutes a condition precedent to a carrier's right to make an effective limitation of liability.

Limitations of time, space and a due consideration of the patience of this Honorable Court does not permit us to analyze each of the cited authorities of petitioner to demonstrate their lack of application to the issue involved herein and we wish to cite *American Railway Express Company* v. *Lindenburg*, 260 U. S. 584, 592, as illustrative of the lack of application of these cases to the issue in the case at bar. In that case, the United States Supreme Court specifically indicated that in addition to the limitation valuation clause in the bill of lading, the shipper actually received the benefits of the lower rate. In the instant case, however, as the Court indicated in its opinion, the plaintiff paid a rate higher than the rate sufficient to purchase full valuation. The same situation obtained in the cited case of *Maugnin* v. *Dinsmore*, 62 N. Y. 35.

It is therefore respectfully submitted that the judgment and opinion of the New York Court of Appeals, affirming the determination of the Supreme Court of the State of New York and the Appellate Division, merely constitutes an affirmation of the express provisions and intent of the federal statute and of the clearly enunciated judicial precedent in both the state and federal courts.

CONCLUSION

Respondent respectfully prays that the petition for a Writ of Certiorari be denied, on the ground that the determination of the New York State courts is correct.

Respectfully Submitted,

CHARLES T. WEINTRAUB,
Counsel for Respondent,
45 John Street,
New York 38, New York.

WEINTRAUB & FASS,
Of Counsel,
45 John Street,
New York 38, New York.